

David Parado appeals his conviction for battery as a class A misdemeanor.¹

Parado raises two issues, which we revise and restate as:

- I. Whether the trial court committed fundamental error when Parado was unable to hear the interpreter during a portion of his trial; and
- II. Whether Parado was denied the effective assistance of trial counsel.

We affirm.

The relevant facts follow. In January 2006, Parado was living with his girlfriend, Maria Valle, and her daughter. Parado argued with Valle, shoved her against a wall, pushed her against a bed, and ordered her to leave the apartment because she refused to give him her daughter's birth certificate and social security card.

The State charged Parado with five counts: (1) criminal confinement, a class D felony;² (2) domestic battery, a class A misdemeanor;³ (3) battery, a class A misdemeanor; (4) battery, a class B misdemeanor;⁴ and (5) intimidation, a class A misdemeanor.⁵ During Parado's bench trial, an interpreter translated the testimony. The State presented one witness, Valle, and the defense presented one witness, Parado. During Valle's testimony, the following discussion occurred:

¹ Ind. Code § 35-42-2-1 (Supp. 2005).

² Ind. Code § 35-42-3-3(a) (2004) (subsequently amended by Pub. L. No. 70-2006, § 1 (eff. July 1, 2006)).

³ Ind. Code § 35-42-2-1.3 (2004) (subsequently amended by Pub. L. No. 129-2006, § 1 (eff. July 1, 2006)).

⁴ I.C. 35-42-2-1.

Q Did he ever tell you why he wanted your daughter's papers?

[DEFENSE COUNSEL]: Objection. Relevance. He already got into fact that she could get in [sic] when he wanted the papers. I don't see how the reason why he would want them would be relevant as to the battery and confinement and intimidation count that we have here today.

THE COURT: Response.

[DEPUTY PROSECUTOR]: Your Honor, it explains why he's trying to get the papers so adamantly and it's not his child. So he doesn't have a right to the papers. It goes to explain and put things into a better context.

[DEFENSE COUNSEL]: I just don't see its relevance.

THE COURT: Sustained. I mean it's already been explained, so.

[INTERPRETOR]: Your Honor, Defendant is not hearing any of this because I'm over here with the . . .

THE COURT: Okay.

[INTERPRETOR]: With the witness.

THE COURT: Can . . . he's not . . . he can . . . he can't hear you? Oh, this conversation.

[INTERPRETOR]: This conversation.

THE COURT: Oh. Okay. Okay. Anything else? Next question, I guess.

Q Did you ever tell the Defendant that you were going to call the police?

THE COURT: Is he listening to . . . can he hear that?

⁵ Ind. Code § 35-45-2-1 (2004) (subsequently amended by Pub. L. No. 3-2006, § 2 (eff. Mar. 2, 2006)).

[PARADO]: I'm not hearing everything.⁶

THE COURT: Okay. Well, he's just . . . he needs to sit up in his chair and if he . . . I get the indication he wasn't paying attention, but if he's really not hearing then he needs to move around and sit up in his chair so that he can hear. Can he hear now? He has to answer me.

[PARADO]: Yes.

THE COURT: Alright. And if he can't then he needs to let us know. Alright. You may continue, Mr. Ping.

[DEPUTY PROSECUTOR]: Thank you, Your Honor.

Transcript at 9-10 (footnote added).

The trial court dismissed all of the charges except the charge of battery as a class A misdemeanor. The trial court found Parado guilty of battery as a class A misdemeanor and sentenced Parado to 365 days in jail, with 349 days suspended to probation.

I.

The first issue is whether the trial court committed fundamental error when Parado was unable to hear the interpreter during a portion of his trial. "An interpreter enables a non-English speaking defendant to understand the trial, provides a means of communication between the defendant and his attorney, and translates the defendant's testimony if he testifies." Martinez Chavez v. State, 534 N.E.2d 731, 737 (Ind. 1989),

⁶ Parado quotes this statement as "I'm not hearing anything" and uses this misquote to assert that he "never heard anything up to that point in the hearing, which was the first half of Ms. Valle's testimony." Appellant's Brief at 6. However, the transcript provides that Parado stated, "I'm not hearing everything." Transcript at 10.

reh'g denied by 539 N.E.2d 4 (Ind. 1989). “The interpreter is necessary to implement fundamental notions of due process such as the right to be present at trial, the right to confront one’s accusers, and the right to counsel.” Id. “A criminal defendant is denied due process when the accuracy and scope of a translation at a hearing or trial is subject to grave doubt.” Id. at 738 (citing United States v. Cirrincione, 780 F.2d 620 (7th Cir. 1985)); see also Mejia v. State, 702 N.E.2d 794, 797 (Ind. Ct. App. 1998) (“An indigent defendant who cannot speak or understand English has the right to have his proceedings simultaneously translated for effective participation.”).

According to Parado, he did not hear the first half of Valle’s testimony. He concedes that he did not object but argues that fundamental error occurred because he had the right to hear and understand the witnesses against him.

A fundamental error is “a substantial, blatant violation of basic principles of due process rendering the trial unfair to the defendant.” Carter v. State, 754 N.E.2d 877, 881 (Ind. 2001), reh'g denied, cert. denied, 537 U.S. 831, 123 S. Ct. 135 (2002). Fundamental error applies only when the actual or potential harm “cannot be denied.” Id. The error must be “so prejudicial to the rights of a defendant as to make a fair trial impossible.” Id. The failure to object to an error involving an interpreter is subject to a fundamental error analysis. See Mariscal v. State, 687 N.E.2d 378, 382 (Ind. Ct. App. 1997) (holding that no fundamental error occurred when the trial court failed to inquire into the interpreter’s qualifications), reh'g denied, trans. denied; Valle v. State, 550 N.E.2d 746, 747 (Ind. 1990) (finding no “deprivation of rights” or “denial of a fair trial”

where the defendant indicated that summaries of the evidence by the interpreter would be sufficient rather than a simultaneous translation), reh’g denied.

We conclude that Parado’s allegation that he did not hear the first half of Valle’s testimony is not supported by the record. Rather, the record indicates that Parado’s counsel objected during Valle’s testimony and a discussion ensued between the trial court and the counsel. The interpreter then indicated that Parado could not hear “[t]his conversation.” Transcript at 10. The trial court corrected the problem, and Parado indicated that he could hear. Parado has not demonstrated a substantial, blatant violation of basic principles of due process rendering the trial unfair. Consequently, Parado’s fundamental error argument fails. See, e.g., Valle, 550 N.E.2d at 747.

II.

The next issue is whether Parado was denied the effective assistance of trial counsel. To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his counsel’s performance was deficient and that the petitioner was prejudiced by the deficient performance. Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), reh’g denied), reh’g denied, cert. denied, 534 U.S. 830, 122 S. Ct. 73 (2001).

A counsel’s performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. French v. State, 778 N.E.2d 816, 824 (Ind. 2002). To meet the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of

the proceeding would have been different. Id. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.

Parado argues that his trial counsel’s performance was deficient because she failed to “notice the [translation] problem sooner, object, or ask the hearing [to] begin again.” Appellant’s Brief at 7. As we noted above, Parado’s allegation that he could not hear the first half of Valle’s testimony is not supported by the record. Rather, the record indicates only that Parado had difficulty hearing a discussion between the trial court and the attorneys regarding an objection by his counsel during Valle’s testimony. The problem was quickly brought to the trial court’s attention by the interpreter and corrected. Parado has failed to demonstrate a reasonable probability that the outcome of the trial would have been different if his counsel had objected to Parado’s inability to hear during that short discussion between the trial court and the attorneys. Parado has failed to demonstrate that he received ineffective assistance of counsel. See, e.g., French, 778 N.E.2d at 826 (holding that the defendant’s claim of ineffective assistance of counsel failed where he did not show prejudice from his counsel’s failure to object to his wearing jail clothes during the habitual offender phase of his trial).

For the foregoing reasons, we affirm Parado’s conviction for battery as a class A misdemeanor.

Affirmed.

SULLIVAN, J. and CRONE, J. concur